COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2015-SC-107-D
(2013-CA-000338)

INDIANA INSURANCE COMPANY — APPELLANT

CAMPBELL CIRCUIT COURT

v.

NO. 09-CI-1175

JAMES DEMETRE — APPELLEE

BRIEF OF APPELLEE JAMES DEMETRE

Jeffrey M. Sanders, Esq.
Jeffrey M. Sanders, PLLC
437 Highland Avenue
Fort Thomas, KY 41075
(859) 380-6867

Robert E. Sanders, Esq.
Justin A. Sanders, Esq.
The Sanders Law Firm
1017 Russell Street
Covington, KY 41011
(859) 491-3000

Kevin C. Burke, Esq.
125 South 7th Street
Louisville, KY 40202

CERTIFICATE OF SERVICE

This is to certify that this Appellee's Brief has been served by mailing a true copy thereof, postage prepaid, on this 22nd day of February, 2016 to Donald L. Miller, II and Kristen M. Lomond, Quintairos, Prieto, Wood & Boyer, P.A., 9300 Shelbybille Road, Suite 400, Louisville, KY 40222; Michael D. Risley, Bethany A. Breetz, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202; Ronald L. Green, Insurance Institute of Kentucky, 201 East Main Street, Suite 1250, Lexington, KY 40507; Hans G. Poppe, Kentucky Justice Association, Justice Plaza, 8700 Westport Road, Louisville, KY 40242; and Hon. Fred A. Stine IV, Judge, Campbell Circuit Court, 330 York Street, Newport, KY 41071.

JEFFREY M. SANDERS, ATTORNEY AT LAW, KBA # 82106
ATTORNEY FOR APPELLEE, JAMES DEMETRE

INTRODUCTION

This case involves a fraudulent and illegal scheme perpetrated by Indiana Insurance Company ("IIC") to wrongfully deny insurance coverage to its policyholder, James Demetre. IIC initiated this scheme almost immediately after Mr. Demetre submitted a claim under his policy with IIC. For more than three years, IIC knowingly and intentionally used false information and concealed relevant information related to material facts with the specific intent of defeating coverage under the policy and unlawfully depriving Mr. Demetre of the benefits of his insurance policy.[1]

This case was tried to a jury in Campbell Circuit Court, one of the most conservative trial venues in Kentucky. After an eight-day trial, the jury found in favor of James Demetre and against IIC on all liability theories: first-party bad faith, violation of the Kentucky Unfair Claims Settlement Practices Act, violation of the Kentucky Consumer Protection Act, and breach of contract. At the conclusion of the trial, the jury awarded Mr. Demetre $3,425,000, which included compensatory and punitive damages.

Circuit Judge Fred A. Stine, V correctly denied IIC's post-trial motions and entered final judgment on the jury verdict. After thoroughly reviewing the trial record, appellate briefs, and hearing oral arguments, the Kentucky Court of Appeals ("COA") unanimously affirmed the judgment of the trial court, finding that IIC's conduct was fraudulent, illegal, unfair, and tortious[2] and holding that the verdict and judgment were, in all respects, proper.

---

[1] For the convenience of the Court, a photocopy of a Timeline of Events, Plaintiff's Trial Exhibit 31-A and 31-B, are attached to this Brief as Exhibits 1 and 2.

[2] *Indiana Ins. Co. v. Demetre*, No. 2013-CA-000338-MR, 2015 WL 393041 at p. 21 (Ky. Ct. App. Jan. 30, 2015), review granted (Oct. 21, 2015).

STATEMENT ON ORAL ARGUMENT

This appellate case involves important issues of insurance law, public policy, and contract law, which are important to and may impact every single citizen in the Commonwealth of Kentucky, who pays premiums for an insurance policy. Accordingly, Mr. Demetre respectfully requests that the Supreme Court hold oral arguments in the appeal.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

I. James Demetre adds liability coverage for properties located in Campbell County and Kenton County to his IIC policies.

In 2006, James Demetre contracted with IIC to carry his home, automobile, and excess umbrella insurance.[1] Together, the bundled policy provided $2.5 million in liability coverage.[2] In April 2008, at the urging of IIC's agent, Mr. Demetre added liability coverage for two other parcels of real estate that he and his wife owned -- one in Kenton County and the other in Campbell County.[3]

Historically, the Campbell County lot had once been the site of a Texaco gasoline station, but it had been closed since 1962 ("the subject property").[4] The underground storage tanks from the old gas station were removed in June 1998. The gas station building was torn down and the remaining site materials removed in 1999 – long before Mr. Demetre acquired any interest in the property. Mr. Demetre has never owned or operated a gas station in his life.[5] Mr. Demetre never made a claim under his IIC policy to pay for any costs related to his property in Campbell County.[6]

II. Mr. Demetre disclosed to IIC that the Campbell County lot had been a gasoline station before IIC approved coverage.

When Mr. Demetre applied for coverage on the subject property on April 30, 2008, he told IIC's agent that the lot had previously been the site of a gasoline station.[7] Gwendolyn Rich, the IIC agent who told the insurance company's underwriting

---

[1] Trial Video Record ("VR"): 9/26/12; 03:27:27.
[2] VR: 9/26/12; 03:25:25; see also Pl. Tr. Ex. 26 at lines 9-10, Pl. Tr. Ex. 102.
[3] VR: 9/26/12; 03:42:42.
[4] VR: 9/26/12; 03:15:28.
[5] VR: 9/26/12; 03:15:57.
[6] VR: 9/26/12; 03:17:44.
[7] VR: 9/26/12; 03:24:57.

department that Mr. Demetre's lot once had a gas station located on it, testified:

> Q. And the underwriter, based upon their training, education, and experience, determines whether or not to insure the risk, and if they want to insure the risk, how much the premium will be, correct?
> A. Correct.
> Q. Okay. Now, that said, is there any doubt whatsoever, whatsoever in your mind that you disclosed that the property on Waterworks Road in Newport, Kentucky had an old gas station on it or it used to have a gas station on it?
> A. Oh, there's no doubt.
> Q. No doubt at all?
> A. No.[8]

Ms. Rich confirmed that she was IIC's agent in the transaction, not Mr. Demetre's agent. She explained that IIC accepted the risk when it sold the policy to Mr. Demetre,

> Q. And so if that's correct, then any information that's found on a policy of insurance issued by Indiana Insurance Company would come through the agents working on behalf of Indiana Insurance Company, correct?
> A. Yes.
> Q. There's no other way for them really to get that information if they don't deal directly with the public, correct?
> A. Correct.
> Q. They have to go through their agents or agencies that they deal with on a regular basis to procure policyholders, correct?
> A. Yes.
> Q. And, again, my last question, is there any doubt in your mind that Indiana Insurance Company accepted the risk for liability on the property on Waterworks Road in Newport, Kentucky on April 30th, 2008?
> A. No.[9]

IIC renewed Mr. Demetre's annual policy on multiple occasions, even during the course of this litigation.[10] Bruce Frederick, IIC's corporate representative[11] at trial and

---

[8] R: D, Gwendolyn Rich's deposition, 08/09/10, p. 67, lns 3-16.
[9] *Id.*, at p. 39, ln 21- p. 40, ln 15.
[10] Pl. Tr. Ex. 102; VR: 9/24/12; 12:24:55. The policy contains no applicable environmental exclusion clause. IIC ***never*** amended the terms or conditions of the policies during any renewal and never raised any objection or reservation or exclusion about insuring the subject property.
[11] VR: 9/25/12; 11:17:15.

Special Claims Unit[12] ("SCU") supervisor, confirmed this to the jury:

> Q. The coverage for relevant endorsements, it says HO. That's a homeowners policy, correct?
> A. Correct.
> Q. There's no pollution exclusion clause in that policy, correct?
> A. Correct.
> Q. And there's no exclusion that applies from the umbrella policy, correct?
> A. Correct.[13]

III. The Harris family makes a claim against Mr. Demetre.

In 2004, Mahannare Harris, along with her six children and adult partner (collectively, the "Harris family"), moved into a house next door to Mr. Demetre's vacant lot in Campbell County.

Mr. Demetre lived in the City of Union in Boone County, Kentucky.[14] He had never met and had never heard of the Harris family until September 4, 2008, when the family's lawyer sent Mr. Demetre a letter.[15] The letter alleged that the members of the Harris family had suffered injuries from gasoline fumes migrating into their home from the subject property ("the *Harris* claims"). The attorney also claimed the Harris family incurred "significant medical damages" and a loss in the fair market value of their home.

If the allegations had been true, the liability exposure for injury to two adults and six minor children – as well as the property damage claim -- could have been staggering. Gasoline contains benzene, a known human carcinogen. Attorney Phillip Schworer explained that exposure could have caused serious health consequences to the family, if the *Harris* claims were true:

---

[12] The SCU handles claims involving construction defects, environmental, toxic tort, intellectual property, class action, and employment matters for Liberty Mutual's regional companies. (R: Q. Bruce Frederick deposition, 03/13/12, p 16, lns 20-24).
[13] VR 9/25/12;11:17:17.
[14] VR 9/26/12; 03:18:11.
[15] VR: 9/26/12; 03:31:48 and Pl. Tr. Ex. 1 at SKS-0058.

Q. . . . is benzene a known human carcinogen?
A. That it is.
Q. And specifically the type of cancer that causes leukemia and other cancers of the blood cells, correct?
A. Right. Exposure is a very serious issue.
Q. I'm sure that you recognize that if the allegations were true and that this family was actually suffering harm from exposure, that that would be a very serious situation that ought to be addressed expeditiously?
A. Yes.[16]

On September 11, 2008, Mr. Demetre timely notified IIC of the *Harris* claims.[17]

IV. IIC turns Mr. Demetre's claim over to its Special Claims Unit.

Upon receipt of the claim file, IIC assigned the claim to adjuster Allen Geisinger.[18] Almost immediately, Geisinger sent an "alert" to IIC's Special Claims Unit ("SCU").[19] Just 88 minutes afterward, Geisinger received a response from a SCU office located in Wisconsin, saying there "may not be coverage."[20]

Afterward, neither adjuster Geisinger nor anyone else with the SCU took *any* action to investigate the *Harris* claims.[21] Instead, IIC launched an all-out investigation of Mr. Demetre -- the sole objective of which was to generate an excuse to deny coverage and leave Mr. Demetre to deal with the Harris family claim, alone and unprotected.

On November 24, 2008, adjuster Geisinger dispatched IIC's Field Investigation Unit ("FIU") to interview Mr. Demetre to find out if he knew about the *Harris* family "loss" *before* insuring his Campbell County property.[22] The adjuster also directed the FIU to Shield Environmental Associates -- the contractor monitoring groundwater deep underneath Mr. Demetre's property for the Commonwealth of Kentucky -- to collect all

[16] VR: 9/25/12; 03:53:18.
[17] VR: 9/26/12; 03:31:01 and PL Tr. Ex. 1.
[18] VR: 9/21/12; 09:11:35.
[19] VR: 9/21/12; 09:04:57 and PL Tr. Ex. 3.
[20] VR: 9/21/12; 09:05:11 and PL Tr. Ex. 3.
[21] VR: 9/21/12; 09:59:47.
[22] VR: 9/21/12; 09:44:22; and PL Tr. Ex. 11.

of the company's records and information. Through these efforts, IIC obtained copies of all environmental records, information, data, and testing documents related to the state's investigation.[23] IIC hoped these documents would give IIC support for the notion that Mr. Demetre knew there was contamination on the Harris family property when he bought insurance from IIC—and that IIC could use that information to deny coverage.[24]

In a letter to Mr. Demetre, however, adjuster Geisinger falsely assured him that IIC was investigating the *Harris* claims.[25]

On March 27, 2009, IIC transferred the claim file to adjuster Karen Glardon.[26] Ms. Glardon admitted she did not investigate the *Harris* claims or do *anything* to protect Demetre's interests during the entire 182 days she handled the file.[27] Thus, for the first 379 days after the *Harris* claims were asserted by the family's attorney in his representation letter, IIC conducted *no* investigation whatsoever of the *Harris* claims,[28] focusing all of its attention, instead, on Mr. Demetre, IIC's own policyholder.

IIC's written corporate policy requires that once a coverage issue is recognized, the adjuster must review the issue with claims management. In this case, however, the SCU "found" a coverage "issue" within 90 minutes of receiving notice of the claim. Moreover, IIC's review of the claims against Mr. Demetre's did not occur for more than

---

[23] Pl. Tr. Ex. 21 and Pl. Tr. Ex. 30. IIC's claim file memorializes no investigative efforts by either IIC or its FIU of the *Harris* claims.
[24] R: F, James Magi deposition (as IIC's corporate representative), 8/12/2010, pp. 44-46.
[25] Pl. Tr. Ex. 16. Adjuster Geisinger's letter made no reference to the fact that IIC had obtained environmental monitoring records from the state. The letter also failed to disclose that the FIU never spoke with the attorney for the *Harris* family; made no effort to interview the *Harris* family members; had not requested medical records or medical bills for the *Harris* family members; had not asked for independent medical exams of the *Harris* family members; had not asked to inspect or sample inside the *Harris* house; or done anything else of substance to investigate the *Harris* claims. In sum, IIC essentially *ignored* the allegations asserted in the *Harris* family's attorney's letter and chose, instead, to focus its time, attention, and resources on finding or, if necessary, *creating* a policy defense so IIC could walk away from the claims and leave its policyholder to fend for himself.
[26] Pl. Tr. Ex. 4 at OCC0003 Line 139.
[27] VR 9/21/12; 11:54:09.
[28] R. 1693-1731 at p. 6-8.

a year after they were made against him. Instead, IIC's executives in Boston conducted the review rather than claims management personnel. Adjuster Magi testified:

> Q. The policy says when a coverage issue is recognized, and this one was recognized by Mr. Cowell on day one, the claim handler should review the issue with claims management. And you're telling me that review took place 14 months later?
> A. That review with the Boston legal group did, correct.[29]

V. The SCU passed the claim file around the company until adjuster James "Ed" Magi was available to handle the claim.

Although IIC received notice of the claim on September 4, 2008, IIC required a specific claims adjuster, James "Ed" Magi, to handle it. For reasons unknown, adjuster Magi was not immediately available to handle the claim. The supervisor of the SCU testified that the claim was delayed until Magi became available on September 25, 2009:

> Q. Someone from your unit, the specialty claims unit, has been involved in this claim from the very beginning. The very first claims adjuster from your unit assigned to this claim was Paula Matheny, correct?
> A. Correct.
> . . .
> Q. Okay. And Paula Matheny had it for a while and then Hollie Sharpe from your unit came up, correct?
> A. Correct.
> Q. And Hollie Sharpe had it until James Magi was assigned the claim, correct?
> A. Correct.[30]

VI. Adjuster Magi was SCU's "go-to-guy" to "handle" environmental and toxic tort claims for IIC.

IIC had its special reasons for wanting only adjuster Magi to handle the claim. Magi had handled thousands of toxic tort claims[31] and earned a well-known reputation within its SCU as the "go-to-guy" to handle such claims.[32]

---

[29] VR: 9/24/12; 03:12:29.
[30] VR:9/25/12: 10:07:44.
[31] Pl. Tr. Exs. 64 and 65.

VII. The SCU has no written claim handling standards or protocol.

The SCU had no written standards or protocols governing claims handling.[33] Instead, adjuster Magi explained how claims were handled in the SCU:

> Q. You told us that for the specialty claims unit, the procedures and protocols and methods of doing business are really passed down from adjuster to adjuster, and are controlled by word of mouth between the supervisors. Do you recall telling me that?
>
> A. Correct.[34]

Free of written rules or protocols for handling claims, adjuster Magi had racked up a record of *closing 72 percent of all insurance claims assigned to him without paying any money to claimants.* (Emphasis added.)[35] Adjuster Magi's "go-to" reputation in the SCU was also built on *delaying* payment of valid insurance claims. Reviewing a spreadsheet of his experience handling environmental and toxic tort claims, obtained from IIC during discovery, Magi admitted at trial:

> Q. Mr. Magi, I will tell you that on this sheet it's the same data, but we simply isolated the claims, the 432 claims where you actually paid something, and 31 percent of these claims -- and they are the ones that are highlighted on the sheet in blue -- *from the time the claim was made until the claim was closed and payment was made, there was a lapse of time of at least ten years. Do you recognize that, sir?*
>
> A. *Yes.*[36] (Emphasis added.)

To best take advantage of Mr. Magi's unique talents and reputation, IIC assigned Magi control of *both* the *Harris* liability claims and Demetre's coverage claim. At trial, Magi admitted:

---

[32] VR: 9/24/12; 09:22:33.
[33] VR: 9/24/12; 02:43:37.
[34] VR 9/24/12; 12:38:49.
[35] VR: 9/24/12; 09:30:58; See also Pl.Tr. Exs. 64 and 65.
[36] VR: 9/24/12; 09:34:55.

Q. At the same time then you became the adjuster on the liability issue, that's also when you became the adjuster on the coverage issue?
A. Correct.
Q. Okay. And you were assigned to do both simultaneously, correct?
A. At that time, correct.[37]

VIII. Meanwhile, IIC continues to renew Mr. Demetre's bundled policy.

On June 29, 2008, IIC renewed Mr. Demetre's bundled policy.[38] IIC then renewed his policy for two additional annual periods, even during the coverage and bad-faith litigation. Adjuster Magi told the jury:

Q. . . . the whole time this dispute was going on with Mr. Demetre, it took about, let's say, from 2008 until 2012, three and a half years to resolve, Indiana Insurance Company renewed this coverage and renewed this policy three times while the dispute was going on, correct?
A. Correct.
Q. All the time knowing the conditions that existed on the property. In fact, it, at one time, been used as a gas station. In fact, for each of the renewals, knowing that Mrs. Harris was making the claims she was making, and renewed it all three times without imposing any exclusion on all for pollution of any kind, right?
A. Correct.[39]

IX. IIC's failure to investigate or otherwise respond to the *Harris* claims caused the *Harris* family to sue Mr. Demetre and IIC.

While IIC solely focused on investigating Mr. Demetre, IIC ignored the *Harris* family and its lawyer. After getting no response or action from IIC on its letter about the claims, counsel for the *Harris* family filed suit against Mr. Demetre on August 14, 2009. The *Harris* family also sued IIC for third-party bad faith.[40]

---

[37] VR: 9/24/12; 10:31:58
[38] Pl. Tr. Ex. 102.
[39] VR: 9/24/12; 12:24:55.
[40] R. 1-6; Pl. Tr. Ex. 42. In the complaint, the *Harris* plaintiffs sued the "Liberty Mutual Group dba Ohio Casualty Insurance and dba the Netherlands Insurance Company." Plaintiffs amended their complaint to add Indiana Insurance Company. R. 35-41; IIC filed an answer and stated the amended pleading "incorrectly referenced the Liberty Mutual Group, Ohio Casualty Insurance and the Netherlands Insurance

After consulting with the SCU, adjuster Glardon engaged attorney Tim Schenkel to "represent" Demetre and attorney Don Lane for IIC.[41] IIC, however, still did not divide or separately manage the liability and bad-faith claim files.[42] Instead, adjuster Magi *continued* to handle both files.[43] One of Magi's first actions after the *Harris* family filed suit was to report the filing to William Wise, an IIC executive in Boston, on November 17, 2009.[44] From that point forward, Mr. Wise ran both the coverage and bad-faith cases.

X. IIC directs and controls both coverage and defense counsel.

At trial Mr. Frederick admitted Magi controlled and manipulated both attorneys:

Q. And, first of all, before I ask you about that, am I correct that the insurance adjuster controls and directs the defense attorney representing the insurance company?
A. Yes.
Q. Representing the Indiana Insurance Company, correct?
A. Correct.[45]

Mr. Frederick succinctly explained Magi's authority over the attorneys to the jury,

Q. And Mr. Magi from September 25th til December the 22nd, 2009 was directing and controlling both Mr. Lane and Mr. Schenkel, correct?
A. Correct.[46]

Mr. Frederick also explained that IIC's control over defense counsel continued after IIC split the coverage and liability files:

Q. And he -- and Mr. Schenkel was being directly controlled by first Mr. Magi?
A. Yes.
Q. And then by Mr. Ambrose, correct?

Company." Only IIC filed a responsive pleading to the amended complaint. R. 48-56. IIC is the only insurer that was a party in this lawsuit.

[41] Pl. Tr. Ex. 41, OCC0455 at lines 177-182

[42] IIC did not separate the file until December 22, 2009 -- 467 days after IIC received notice of the *Harris* claims. R. 1693-1731 at p. 8.

[43] Pl. Tr. Ex. 41, OCC0455 at line 194; VR 9/24/12; 10:31:58.

[44] Pl. Tr. Ex. 68, OCC 0456 at line 231.

[45] VR 9/27/12:09:23:07.

[46] VR: 9/25/12; 01:50:31.

A. Correct.[47]

Adjuster Magi's control over defense counsel in the *Harris* case -- while simultaneously managing the *coverage* case *against* Mr. Demetre -- was highly prejudicial. Adjuster Magi could not serve two masters, resulting in a conflict of interest. To no surprise, Magi chose to serve only the master paying his salary.[48]

On October 6, 2009, defense counsel asked Magi for permission to hire an expert to "determine the status" of Mr. Demetre's property with the state environmental agency.[49] After adjuster Magi gave him permission, attorney Schenkel asked his associate, Jason Morgan, to locate an expert to check the state regulatory records.

On October 21, 2009, the associate told defense counsel that he had talked to Bill Johnston, an environmental engineer from Louisville, and learned that Demetre's property was "in Site Investigation NOT Corrective Action." In a memorandum, the associate wrote, "(I)f the site is in Site Investigation and not Corrective Action, ***it is unlikely that the Plaintiffs' [the Harris family] claims [against Demetre] are legitimate.***"[50] Defense counsel's practice was to relay all information to adjuster Magi.[51]

On November 4, 2009, defense counsel told Magi that he was "in the process of retaining an expert from Louisville," i.e., Bill Johnston. Defense counsel said he would send the expert's "CV and rates" to Magi.[52] When defense counsel made this request, he was under adjuster Magi's control and direction. Adjuster Magi told the jury,

---

[47] VR: 9/25/12: 02:14:29.
[48] While controlling Demetre's defense in the *Harris* case, Magi played an active role in IIC's cross-claim filed against Demetre. He was IIC's CR 30.02(6) corporate representative. His testimony was used *against* Demetre in IIC's summary judgment motion on coverage. Adjuster Magi also verified Demetre's discovery responses in the coverage case against IIC. R. I at Exhibit 15.
[49] Pl. Tr. Ex. 67. A photocopy of the oversized Exhibit prepared by IIC is attached to this Brief as Ex. 3.
[50] Pl. Tr. Exs. 72 and 73.
[51] Pl. Tr. Exs. 69 and 76; R. I.
[52] Pl. Tr. Ex. 68 at lines 226-228.

Q. Mr. -- and this is within the time – this is within the boundaries, the beginning and ending dates, when you were still the claims handler supervising both of these lawyers, Timothy Schenkel and Jason Morgan, correct?
A. Correct.[53]

When asked about the associate's conclusion that the *Harris* family's allegations against Mr. Demetre lacked merit, adjuster Magi answered,

Q. Do you understand Mr. Morgan's logic, sir, is my question?
A. Yes.
Q. In which he said to Mr. Schenkel if the site is in investigation, not corrective action that it's unlikely that there is any merit to the Plaintiff's claims. Do you understand the logic?
A. That particular logic, yes.[54]

Adjuster Magi denied knowledge of the associate's memo, but he told the jury,

Q. This memo is directly responsive to the purpose for which you had engaged or you had authorized Freund Freeze & Arnold to engage an expert, correct?
A. Yes.
Q. And it is directly responsive to the purpose for which you authorized them to engage an expert, namely to explore the site cleanup, to determine what cleanup had been done at the site, correct?
A. Yes. My discussion with Mr. Schenkel was that we were going to hire an expert to give us an idea of what was going on at the site.[55]

Armed with this information from the environmental engineer from Louisville, Magi, who had handled thousands of environmental claims,[56] knew or should have known -- by October, 2009, at the very latest -- that there was likely no merit to the *Harris* claims. The environmental engineer's information meant that there was no "known loss" or "on-going loss" on the Harris family's property. It meant there was no loss at all.

---

[53] VR: 9/24/12; 11:42:09.
[54] VR 9/24/12; 12:04:17.
[55] VR: 9/24/12: 11:59:00.
[56] Pl. Tr. Exs. 64 and 65.

Bill Johnston's opinions flatly contradicted and exposed the spurious nature of IIC's "known loss" and "on-going loss" coverage defenses. Rather than abandon those bogus coverage defenses, however, IIC never hired Bill Johnston or shared this key information with Mr. Demetre. IIC deliberately sabotaged Demetre's defense so that it could attempt to escape its legal duties by advancing false coverage defenses.[57]

XI. Adjuster Magi announces IIC's intention to defeat coverage under Mr. Demetre's policy.

With Mr. Johnston, the environmental expert, out of the picture, adjuster Magi focused IIC's immense resources solely on trying to defeat and void Mr. Demetre's insurance coverage. On December 11, 2009, adjuster Magi sent a second Reservation of Rights letter to Demetre, plainly laying out IIC's plan:

> As you know, Indiana has assigned the law firm of Freund, Freeze & Arnold to defend you in connection with the action. ***Indiana shall continue such defense until a determination is made that no coverage exists for the underlying claim and reserves the right to withdraw from the defense*** as permitted under the applicable insurance referenced above, the policy. (Emphasis added).[58]

Throughout the case, it was the adjusters, claims handlers, and executives of IIC who controlled, directed, and ran everything. Mr. Magi's testimony to the jury clearly demonstrated that these lawyers were nothing more than puppets that IIC controlled:

> Q. During that period of time, if the lawyer representing Indiana Insurance Company wanted to engage an expert for any reason, the lawyer had to ask you and you -- while you would certainly discuss it I'm sure with the lawyer, taking his or her opinion into account for why you needed it, ultimately the decision to hire an expert would be made by you, correct?
> A. Correct.
> Q. Steps taken in litigation, whether to file a motion for summary judgment, whether to file a motion to bifurcate something, or take any other significant step in the conduct of litigation, has to be

[57] VR: 1/17/13; 09:19:52.
[58] Pl. Tr. Ex. 78.

suggested by the lawyer to you, discussed with you, and be approved by you before the lawyer can do those things, correct?

A. Correct.

Q. In this case, in the earlier portions of this case, when Mr. Schenkel was representing James Demetre in defending the claims that were being made against him by Mahannare Harris and members of her household, Mr. Schenkel had to have your permission and your approval to retain any experts that were needed because you were in charge, for at least a period of time, as the claims representative on the liability file, correct?

A. Yes.

Q. The claims adjuster controls the defense of the policy holder, supervising and directing what the lawyer hired by the insurance does, correct?

A. Correct.[59]

On December 22, 2009, IIC finally divided the *Harris* claims file and the coverage and bad-faith file and assigned the *Harris* claims file to adjuster William Ambrose.[60] Adjuster Magi *retained* the coverage and bad-faith files so he could continue to direct and control IIC's coverage fight against Mr. Demetre.[61] But before IIC filed its declaratory judgment action against Mr. Demetre on January 25, 2010, adjuster Magi instructed coverage counsel to put together a chronology of events occurring on Mr. Demetre's property. When asked what coverage counsel reported back to him, adjuster Magi told the jury:

Q. And what coverage counsel found was simply there was no -- there is no history of cleanup, because it's always been an investigation site and not a remediation site, correct?

A. Are you speaking about the Demetre's site or the Harris' site?

Q. The Demetre site.

A. Well, my understanding is there was soil removed from that site.

Q. Okay. You and I just said that. When the USTs were dug out, they took some soil away, right? Later, when the sanitation district put a trunk line sewer across the property and replaced it with a big

[59] VR: 9/24/12; 10:07:22.

[60] Although the files were split, defense counsel, whose only loyalty was *supposed* to be to Demetre, not to IIC, *continued* to report about developments in the *Harris* case to adjuster Magi. R. I at pp. 8-11; VR: 9/24/12; 12:27:46.

[61] VR: 9/24/12; 12:17:39.

trunk line sewer, all the soil wouldn't fit back in the hole, and so they took some soil away, correct?

A. Correct.

Q. That's all the soil that's ever been removed there, correct?

A. As far as I know.[62]

XII. Adjuster Magi fabricated IIC's coverage defenses.

In his deposition as IIC's corporate representative duly noticed under CR 30.02(6), adjuster Magi explained the factual bases for IIC's "known loss and ongoing loss" policy defenses asserted against Mr. Demetre in the declaratory judgment action. Adjuster Magi *falsely* testified that IIC had documents in its claim file confirming that petroleum contamination existed on and under the *Harris* property before Mr. Demetre insured his lot. When asked about the documents supporting the defenses, Magi testified:

Q. And has that document been produced to us?

A. I don't know.

MR. LANE: And I'll just state for the record the entirety of the claim file has been produced. There was also an ongoing investigation after the lawsuit was filed, and any documents that we obtained from Shield and from the state have likewise been produced.

Q. So, if I look at the claims file that's been produced by Indiana Insurance Company in this case, I'm going to find proof of soil contamination on Mrs. Harris's property prior to April 30th, 2008; correct?

A. Correct.

Q. That's the position of Indiana Insurance Company; correct?

A. Correct.

Q. I'm going to find a document confirming or verifying or identifying groundwater contamination underneath Mrs. Harris's house or Mrs. Harris's property prior to April 30th, 2008, in the file; correct?

A. Correct.

Q. That's the position of Indiana Insurance Company; correct?

A. Correct.

Q. I'm going to find in the file documentation identifying soil vapors on her property, on Mrs. Harris's property, existing prior to April 30th, 2008, in the file; correct?

A. Correct.

---

[62] VR-9/24/12; 04:24:02.

Q. And, again, that's the position of Indiana Insurance Company; correct?
A. Correct.
Q. And that is the factual basis for the allegation that this is a known loss; correct?
A. Correct.
Q. Is there any other type of contamination that's been identified or alleged or investigated on either Mrs. Harris's property or Mr. Demetre's property that supports the position of Indiana Insurance Company that Mr. Demetre knew about this loss prior to April 30th, 2008?
A. Not that I can think of right now.[63]

IIC *never* produced any document in discovery or at trial to support Magi's testimony -- because none exist. As IIC's corporate representative, adjuster Magi gave false testimony to support IIC's fraudulent coverage defenses against Mr. Demetre. If any such documents *did exist,* one may be assured they would have been used as evidence at trial and would be part of the record before this Court. Adjuster Magi knowingly and intentionally lied about the existence of such documents so that IIC could raise two meritless coverage defenses against Mr. Demetre.

Adjuster Magi was not acting alone in this insurance fraud. Higher up the corporate ladder, IIC's Boston-based executive, William Wise, made the decision to file suit against Mr. Demetre to challenge coverage. Adjuster Magi testified:

Q. Proposed declaratory judgment actions must be approved by the office's designated claims legal attorney prior to filing. Tell me who the home-office claims legal group designated legal claim's attorney was for this case.
A. I believe it was William Wise.
Q. And show me where Mr. Wise approved the filing of the declaratory judgment action.
A. I believe it was done between him and Mr. Lane.
Q. Is there anything in the diary that you-all were required to keep by law from which you should be able to reconstruct a claim that says any such consultation took place?
A. No, it's not in my notes. No.[64]

[63] R: F, at pp 44-46.

Asked about IIC's ultimate goal in filing suit against Mr. Demetre, Mr. Frederick admitted to the jury:

> Q. But they sued James Demetre for declaration under the policy finding that there was no coverage or no reason to indemnify him, there wasn't coverage. There's no coverage. If you don't have coverage, you don't have to defend and indemnify, correct?
> A. Correct.[65]

At trial, adjuster Magi alleged that a letter from the state agency[66] was IIC's "basis" for its coverage defenses in the declaratory judgment action. When questioned, however, adjuster Magi confessed to the jury:

> Q. The analyses submitted indicate the presence of BTEX constituents above allowable levels in the following areas: Entire code on site, and possibly off site, to the east and west. This indicates the necessity for additional site investigation. That, I gather, is the paragraph that got you excited that you might have support for known loss defense, correct?
> A. That paragraph indicates that the state believed there was a good possibility of contamination on the Harris' property.
> Q. Where do you see any reference in this paragraph to the Harris' property?
> A. It says, off site to the east and west.
> Q. Okay. You and I discussed that this morning. You told me you had never seen the site, never -- and had no knowledge of what was east, what was west, whether that meant the Harris' property or whether that meant the holler down below with the creek running through it. Are you telling me now you do know?
> A. No.
> Q. You never investigated to determine whether the Harris' property was north, south, east, or, west of the Demetre property, did you?
> A. Well, after we received copies of the letters from the state to the Harrises explaining that they wanted to come on the property, then it would seem that they wanted to do it on the Harris' property.
> Q. Answer my question. Did you ever investigate whether it was north, south, east or west?
> A. I personally did not, no.[67]

---

[64] VR: 9/24/12; 03:13:08.
[65] VR: 9/25/12; 10:25:43.
[66] Pl. Tr. Ex. 79.
[67] VR: 9/24/12; 02:29:52.

Adjuster Magi revealed to the jury that he never called or instructed anyone to call Eric Brown, who wrote the letter from the state agency.[68] Adjuster Magi confessed he did not even know if the letter had anything to do with the *Harris* claims.

> Q. . . . But for, as a coverage issue, you'd have to know whether this letter has anything to do with the Harris' property before you could determine that this was a justification for denying coverage, correct?
> A. Correct.
> Q. You didn't do that?
> A. I didn't.
> Q. And in the entire time that you handled the coverage side of the case, you never did that?
> A. No.[69]

Adjuster Magi admitted to the jury that if any pollution existed on Mr. Demetre's lot, it was not visible to the human eye and would be located deep underground because 50 years had passed since the station was closed.[70] Magi confessed:

> Q. Do you have any reason to think that Jim Demetre should somehow know what's 30 feet underneath that lot that we just saw in the photograph?
> A. Well, I don't think he knew what was under the ground 30 feet, but he received this letter that the state wanted to conduct an off-site investigation.[71]
> ...
> Q. Okay. In any event, if Mr. Demetre had read this letter, this letter doesn't cause him to know anything about contamination off his site, except that it's possible and that there was contamination on his site, correct?
> A. That's correct.
> Q. On his site is no big deal, right? Well, I presume your underwriting department likely knew that, because they were informed that it was a former gasoline service station site, correct?
> A. That's correct.
> Q. Okay. There are very few former gasoline service station sites where underground storage tanks have been for years that do not

[68] VR: 9/24/12; 2:37:24.
[69] VR 09/24/12; 02:31:31.
[70] VR 9/24/12; 2:34:16.
[71] VR: 09/24/12; 02:35:38.

have some degree of contamination and petroleum products in the soil, correct?

A. That's correct.

Q. And it doesn't mean that it's migrating off site; it doesn't mean that it's harming anyone; and, as we can see from the action or inactions of the Kentucky Environmental Public Protection Cabinet, it doesn't mean it's going to harm anyone, correct?

A. Correct.[72]

Almost two years earlier, the trial court overruled IIC's motion for a summary judgment based on the same letter. In his order,[73] the trial judge reasoned:

> The only proof in the record is a letter indicating the presence of BTEX constituents above allowable limits on the Demetre property with the possibility of migration east and west. What is noticeably absent from this notification is any indication of *actual* offsite migration or an indication of such and whether any migration was in an amount rising to unallowable levels. As such, this Court cannot decide these issues of fact as they fall exclusively within the province of the jury. *Id.*, at p. 7.

On January 21, 2011, Mr. Demetre filed a motion to discharge the defense counsel hired by IIC to represent him in the *Harris* litigation.[74] On March 7, 2011, defense counsel asked for leave to withdraw because of a "conflict of interest."[75] The trial court granted the motion on March 22, 2011.[76] IIC retained new counsel for Demetre.

XIII. In two additional cross-claims, IIC attempted to deny Mr. Demetre's right to indemnity under his policy.

On February 10, 2011, IIC dropped its "known loss" and "on-going loss" defenses because it had no evidence to support them.[77] IIC then asserted a new defense theory against Mr. Demetre -- "time-on-loss" -- to apportion the lion's share of any *Harris*

---

[72] VR: 9/24/12; 02:38:15.
[73] R. 264-271.
[74] R. 272-312.
[75] R. 334-335.
[76] R. 341-342.
[77] R. 321-331; also see Order of May 16, 2011, R. 354-356.

plaintiffs' damages to a time period outside of the policy's effective dates.[78]

On June 29, 2011, IIC filed a second cross-claim alleging that the loss occurred prior to the first effective date of the policy covering Mr. Demetre's Campbell County lot.[79] On November 7, 2011, IIC filed yet another cross-claim, essentially restating its "time-on-loss" defense.[80] Under the time-on-loss theory, IIC argued that Mr. Demetre would be liable for 50 percent of any personal-injury damages[81] and two-thirds of any property damages awarded to the *Harris* plaintiffs.[82]

When questioned at trial about IIC's second and third cross-claims against Demetre, Magi admitted there was no factual basis for the "time-on-loss" theory:

> Q. Did you speculate that there was injury to the Harrises between 2004, when Mrs. Harris bought the place, and 2008, when Mr. Demetre insured it?
> A. There was a possibility, so we simply reserved our right on that.
> Q. But there was no evidence to support that, other than your speculation and conjecture, correct?
> A. Correct.[83]

Mr. Demetre gave the representation letter from the *Harris* family attorney to IIC within days after he received it in September 2008. In November 2011, despite having *three years* to "investigate," IIC admittedly had "*no evidence*" to support its suit against Mr. Demetre or its policy defenses "other than *speculation and conjecture*."

---

[78] IIC's time-on-loss apportionment theory was based on *Aetna Casualty & Surety Co. v. Commonwealth of Kentucky*, 179 S.W.3d 830, 842 (2005). Time-on-loss is an equitable remedy that courts often use to apportion liability among multiple insurance companies over different policy periods in CERCLA cost-recovery actions. This Court ruled in *Aetna* that time-on-loss is *not* applicable when dealing with a single insurer and a single policy. At p. 842. Thus, time-on-loss was not a valid legal theory for IIC to sue Mr. Demetre under the facts of this case.
[79] R. 420-427; Pl. Tr. Ex. 86.
[80] R. 635-643; Pl. Tr. Ex. 87.
[81] VR: 9/25/2012; 10:45:21.
[82] VR: 9/25/12; 10:55:51.
[83] VR: 9/24/12; 03:45:24.

XIV. New defense counsel finally begins to investigate the allegations of the *Harris* family asserted in the tort suit more than two years after the suit was filed against Mr. Demetre.

On September 28, 2011—***770 days after the Harris family filed suit against Demetre***—Demetre's newly appointed counsel began the first-ever investigation into the merits of the *Harris* lawsuit. He finally deposed Ms. Harris. Other depositions followed, as well as an independent medical exam, and inspections of the Harris home by experts. The final deposition in the *Harris* case was completed on December 19, 2011.[84]

Once undertaken, ***the whole inquiry proving the invalidity of the Harris family claims took less than three months to complete.***[85] The evidence from this investigation proved the *Harris* case was "vulnerable to summary judgment," or at best, "a nuisance-value case," according to Mr. Demetre's new defense counsel.[86] His opinions on the merit of the *Harris* claims were virtually the same as found in an October 21, 2009, memorandum written by the former defense counsel's associate after discussing the matter with Bill Johnston, the environmental engineer, and completely consistent with the information and data in the state environmental agency's files.

Notwithstanding defense counsel's evaluation of the matter as a "nuisance case," IIC proceeded to "settle the case" on January 23, 2012, paying the *Harris* plaintiffs $165,000.00.[87] By paying this settlement, IIC could argue – and still argues -- that it "never denied [Demetre] coverage, had defended [Demetre] at all times, and had indemnified [Demetre]."[88] Why did IIC pay $165,000 to settle a nuisance value tort

---

[84] These depositions are part of the record, but are unnumbered. *See, e.g.*, R: J, K, L, EE and FF.
[85] R. 1693-1731.
[86] See Pl. Tr. Ex. 72; see Pl. Tr. Ex. 97, a Pre-Mediation Statement prepared by defense counsel, which contains 11 pages of detailed analysis of the evidentiary proof to conclude, "(i)n its essence, this is a nuisance value case."
[87] R. 885-887.
[88] Appellant's Brief, p. 2.

claim? As in every other instance in this case, IIC was serving only its own interests.

XV. Demetre sues for breach of contract & violation of UCSPA and CPA.

On November 14, 2011, Mr. Demetre filed a cross claim against IIC. He alleged violation of the Kentucky Unfair Claims Settlement Practices Act ("UCSPA") and the Kentucky Consumer Protection Act ("CPA") as well as breach of contract based on implied covenants of good faith and fair dealing.

Even after the *Harris* case settled, IIC did not voluntarily abandon its admittedly meritless time-on-loss defense. On February 17, 2012, the Circuit Court dismissed IIC's third cross-claim against Mr. Demetre on a motion made by his personal counsel.[89]

In summary, IIC fought its own insured, Mr. Demetre, for 1,197 days -- more than three years-- from the date it received notice of the *Harris* family claims until the date when IIC ultimately settled these claims in an effort to serve its own interests, rather than those of its policyholder. The fight cost Mr. Demetre three years of his life and $397,541.04[90] of his life savings to finally force IIC to honor its contractual obligations under his policy, i.e., to conduct a reasonable and objective investigation, provide a defense, and indemnify Mr. Demetre.

At trial, Mr. Demetre testified at length about the emotional, psychological, and financial damages he suffered because of IIC's intentional and wrongful misconduct. At age 72, Mr. Demetre exhausted a large part of his life savings fighting his own insurance company. He had contracted with IIC to protect him from liability and defend him – even

---

[89] R. 889.

[90] R: DD at Ex. 1. The fees and expenses incurred by Demetre from August 27, 2009 (execution of fee contract) through February 17, 2012 (dismissal of IIC's cross-claim against Demetre) were incurred by Mr. Demetre to force IIC to honor the terms of the insurance policies. The remaining fees -- incurred from February 18, 2012 through October 4, 2012 -- were awarded by the trial court under its inherent powers to punish IIC's bad-faith litigation conduct. See R: DD at 9-12.

from frivolous claims. Instead, IIC turned its considerable resources against its own insured and put him through three years of costly, stressful litigation. Mr. Demetre agonized with fear and worry about the harm a large liability judgment could cause to him and his family if the *Harris* family claims were successful.[91] IIC's assault on Mr. Demetre's personal integrity and its protracted, baseless legal assault against him multiplied his emotional and psychological distress.

The jury in this case correctly held IIC accountable for its intentional, deceitful, and malicious misconduct under all causes of action considered by them. The trial judge, in whose court this case was litigated for more than two years, devoted the time and effort needed to understand Demetre's arguments about how the insurer had violated its duties and obligations under the law and the insurance contract. The judge correctly denied IIC's post-trial motions.

The Court of Appeals affirmed the trial court judgment, choosing to examine the facts and circumstances of an insurer's bad-faith conduct on a case-by-case basis rather than apply a "blanket rule shielding an insurer from bad faith in [all cases where an insurer defends under a reservation of rights but ultimately provides coverage]."[92] The appellate court's consideration of all of the facts and evidence relating to IIC's willful and wanton bad-faith conduct and unlawful and deceitful business practices was careful and deliberate, and its application of Kentucky law to the circumstances of this case was just and appropriate. The courts below got it right. This Court should affirm.

---

[91] VR: 9/26/12; 3:39:50. See also, VR 9/26/2012; 4:05:10; VR 9/26/12; 4:13:07; and VR: 9/26/12; 4:22:42.
[92] Court of Appeal's Opinion, at p.16, *id.*

LEGAL ARGUMENT

I. The trial court properly denied Appellant's Motion for JNOV on the breach of contract and the Kentucky Unfair Claim Settlement Practices Act and Consumer Protection Act causes of action.

Mr. Demetre's proof in this case -- supported by expert testimony and damning admissions made by IIC representatives -- demonstrates that for more than three years IIC's adjusters intentionally hid material evidence, fraudulently concealed or misrepresented material facts, and willfully delayed the investigation and defense of the *Harris* family claims. IIC repeatedly denied Mr. Demetre his rights under the insurance policy. IIC's misconduct, carried out by its top-level claims handlers and executives, was a breach of contract and violated Kentucky's UCSPA and CPA.

The trial court correctly denied IIC's motion for JNOV. The jury's verdict was supported by ample, clear, and convincing evidence and certainly not "palpably or flagrantly" against the evidence. The standard of review for a denial of a directed verdict or motion for JNOV is set forth in *Taylor v. Kennedy*[93]:

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

An appellate court must affirm the trial court's denial of a JNOV motion "unless there is a *complete absence of proof on* a material issue in the action, or if no disputed

[93] 700 S.W.2d 415, 416 (Ky.App.1985).

issue of fact exists upon which reasonable men could differ."[94] A reviewing court is "not at liberty to assess the credibility of witnesses or determine what weight is to be given the evidence."[95] An appellate court can only reverse if the verdict was so palpably or flagrantly against the evidence to invalidate the verdict.[96] This Court may only disturb the ruling of the trial court if no reasonable juror could have found in Mr. Demetre's favor.[97] That is clearly not the case here.

The jury found in favor of Mr. Demetre under all theories of liability -- violations of the UCSPA, violations of the CPA, and breach of contract. As this Court made clear in *Martin v. Ohio County Hospital Corp.*,[98] even if the trial court erred by allowing one theory of liability to go to the jury, the error is harmless if the jury finds against the defendant under another theory of liability.[99] The verdict in Mr. Demetre's favor on ***all three claims*** is testament to the strength of the clear and convincing evidence presented at trial regarding IIC's wrongdoing.

i. <u>Mr. Demetre made a claim under his policy.</u>

Contrary to IIC's assertion, and as the Court of Appeals correctly *held*, Mr. Demetre made a "claim" under his policy when he turned in the *Harris* family claims to his insurer in September 2008.[100] The letter from the *Harris*' attorney triggered IIC's

---

[94] *Banker v. Univ. of Louisville Ath. Ass'n, Inc., 466 S.W.3d. 456,* 460 (Ky., 2015)(citing *Savage v. Three Rivers Med. Ctr.*, 390 S.W.3d 104, 111 (Ky.2012)(string citations omitted)).
[95] *Childers Oil*, 256 S.W.3d at 25 (Ky. 2008).
[96] *Id.*
[97] *See Banker*, 466 S.W.3d at 460.
[98] 295 S.W.3d 104, 115-16 (Ky. 2009).
[99] *Id.* at 115-16. ("Appellants alleged multiple tortious acts, and the trial court eventually instructed on three theories against the hospital based on those alleged acts: a policy and procedures claim, a general medical negligence claim, and the EMTALA claim.... [T]his Court concludes that while the failure to give a directed verdict on the EMTALA claim in this case was error, it was harmless as to the damages award returned by the jury under the policy and procedures claim or the general negligence claim, which were not appealed").
[100] *See* Court of Appeals Opinion at 15. At trial, Jury Instruction Number 2 stated: "The word 'Claim' means, "the assertion of a right or a demand for something that is believed to be rightfully due under an

fiduciary duties of good faith and fair dealing owed to Mr. Demetre. Under the policy, Mr. Demetre was entitled to: (1) a timely and reasonable investigation into the claims alleged against him;[101] (2) an independent legal defense; and (3) indemnification, up to the limits of his coverage, in the event a judgment was entered against him.

ii. IIC's breach of contract/duties of good faith and fair dealing

"In every contract, there is an implied covenant of good faith and fair dealing." *Ranier v. Mount Sterling Nat. Bank*.[102] Adjuster Magi explained this principle to the jury:

> Q. Do you agree that insurance companies owe its policyholders a fiduciary duty of good faith and fair dealings at all times?
> A. Yes.
> Q. As applied to this case that means Indiana Insurance Company, that you were doing the adjustment for, owed James Demetre a fiduciary duty of good faith and fair dealings from the moment he reported his claim, and for all time after that, until the claim was resolved?
> A. Yes.
> Q. Do you agree that the business of insurance is highly specialized in that non insurance people, policyholders, people like James Demetre, are particularly vulnerable and dependent on the insurance company to honor its fiduciary duty of good faith and fair dealings?
> A. Yes.
> Q. Do you agree that an insurance company is required to treat its policyholders' interest with equal regard to which the insurance company treats its own interests?
> A. No. We treat the insured's interest above ours.
> Q. Are you required to treat the insurance companies – the policyholders' interest with equal regard to the insurance company's own interest?
> A. No, we treat them with more regard.[103]

Mr. Magi's testimony explains how IIC *should* have treated Mr. Demetre when he

---

insurance policy." The definition of "claim" is taken from *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 530 (Ky. 2006).

[101] KRS 304.12-230(4) requires an insurer to conduct a reasonable investigation based upon all available information.

[102] *812 S.W.2d 154, 156 (Ky. 1991)*

[103] VR: 9/24/2012; 9:43:58.

made a claim under his policy in September 2008. IIC never acted in good faith or with fair dealing in handling the claim made under Mr. Demetre's policy. If IIC had timely conducted a basic investigation of the *Harris* family claims, as it should have done, these claims would have been quickly proven false and easily defended. Instead of doing anything of substance to determine the legitimacy of the *Harris* family claims, however, IIC initiated a fraudulent scheme to deny Mr. Demetre the benefits due to him under his insurance policy for more than three years. IIC's intentional, wanton, and malicious misconduct in handling Mr. Demetre's claim shattered all notions of the "peace of mind" and "protection" that liability insurance is intended to provide to a policyholder.

Even now IIC claims that it did not breach the insurance contract. After seeing and hearing eight days of testimony and evidence detailing IIC's gross misconduct, the trial court succinctly rejected IIC's argument in his ruling on IIC's JNOV motion:

> This theory would allow an insurance company to treat its insured that way without any recourse or any consequences and they could raise any marginal defenses to coverage that they wanted without any consequence, so long as they didn't deny coverage out right, or deny payment at the end.[104]

IIC also persists in alleging a false argument that the trial court either ruled that IIC did not breach the insurance contract, or "recognized that [IIC's] coverage defense had factual and legal support."[105] Calling IIC's argument a red herring, the trial court admonished IIC's trial attorneys that:

> ***I have never found and I made it very, very clear that I never intended to find that Indiana Insurance did not breach its contract with, of insurance, with James Demetre.*** What I did and I think it's an April 26, 2011 order, what I did, I found that I was not willing at that time, with what was before the court at that time, to summarily find that Indiana had

[104] VR: 1/17/13; 09:18:12.
[105] IIC's Motion for Discretionary Review at 9; Appellant's Brief at p. 11.

done so.[106]

IIC cites to *Guaranty National Ins. Co. v. George*[107] to support its assertion that it did not breach the contract. Nothing in *George* remotely suggests that an insurer or its adjuster can lawfully control, direct and manipulate an insured's defense counsel, wrongfully deny an investigation into claims; offer false testimony to raise sham coverage defenses; intentionally conceal material evidence to raise sham policy defenses; repeatedly sue its own policyholder; and force its policyholder to spend hundreds of thousands of dollars to fight the insurer's willful and wanton misconduct – all without recourse. But that is exactly IIC's position in this Court. As this Court acknowledged in *George*, certain cases dictate that an insurer's intentional misconduct justifies an action for bad faith. This case is one of them.

iii. Breach of duty to defend.

"The insurer has a duty to defend if there is any allegation which potentially, possibly, or might come within the coverage of the policy."[108] Indeed, ***"[t]he duty to defend continues to the point of establishing that liability upon which plaintiff was relying was in fact not covered by the policy and not merely that it might not be."***[109] This "is a contractual right of the insured for which he has paid a premium, and the duty to defend is broader than the duty to indemnify."[110]

IIC was not presented with an "either/or" choice of either providing Mr. Demetre a defense *or* attempting to avoid coverage. Whether IIC chose to contest coverage or not,

---

[106] VR: 1/17/13; 09:14:38. Even if the Court made such a finding, any such order is interlocutory and subject to revision based on the proof at any time before entry of final judgment. See CR 54.02(1)(all orders are "interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.")

[107] 953 S.W.2d 946 (Ky. 1997).

[108] *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991).

[109] *Id.*

[110] *Id.*

the insurer had a contractual and statutory obligation to fully investigate the *Harris* family claims and provide Mr. Demetre an appropriate legal defense. Lawfully, IIC *cannot* sabotage Mr. Demetre's defense by blatantly controlling and manipulating defense counsel, failing to investigate claims made against its insured, concealing evidence that would have exonerated Mr. Demetre, and dishonestly avoiding coverage under the insurance policy. That is what IIC did in this case, and the jury certainly was entitled to find this way in its verdict, based on the ample evidence and testimony at trial.

With regard to IIC's contractual duty to defend, IIC used its direct control over defense counsel and its superior financial resources to delay, deny, subvert, and prejudice Mr. Demetre's legal defense. Adjuster Magi admitted this at trial:

> Q. In this case, in the earlier portions of this case when Mr. Schenkel was representing James Demetre in defending the claims that were being made against him by Mahannare Harris and other members of her household, Mr. Schenkel had to have your permission and your approval to retain any experts that were needed because you were in charge, for at least a period of time, as the claims representative on the liability file, correct?
> A. Yes.
> Q. The claims adjuster controls the defense of the policyholder, supervising and directing what the lawyer hired by the insurance company does, correct?
> A. Correct.[111]

Exercising unbridled and absolute control over defense counsel for 562 days in a tort case alleging exposure of two adults and six young children to a human carcinogen, IIC's adjusters did *not* allow defense counsel to:

- Depose the doctor, who offered expert opinions that the Harris family members sustained personal injuries due to alleged exposure to petroleum constituents;
- Depose Ms. Harris' psychiatrist, who also treated two of her minor children;
- Retain an independent medical professional to examine, test, or otherwise evaluate the physical condition of the plaintiffs alleging personal injuries;
- Take a single deposition of the eight Harris plaintiffs who sued Demetre;

[111] VR: 9/24/12; 10:08:36.

- Retain an expert investigate allegations that petroleum contamination was migrating into Harris' house through a sewer or drain line;
- Retain a plumber to inspect the physical integrity of the drain line;
- Retain a real-estate appraiser to evaluate the Harris property-damage claim;
- Depose the Harris' property appraiser;
- Challenge any of Harris' dubious legal theories through an appropriate motion in court; and
- Meet with, discuss, or otherwise prepare Demetre for his deposition.[112]

Because of IIC's continuing control over defense counsel, attorney Schenkel's departure from the case did not immediately change IIC's delay strategy. Successor counsel entered their appearance on March 7, 2011, but did not take any affirmative step to defend Demetre until counsel attended the deposition of Ms. Harris on September 28, 2011-- ***770 days after Harris filed suit against Demetre.*** IIC implies in its appellate brief that the delay in investigating the *Harris* claims is a minor issue. Kentucky courts, however, have steadfastly held that similar facts warrant a finding of bad faith.[113]

IIC's control over and manipulation of defense counsel severely prejudiced Mr. Demetre's interests to a fair and impartial legal defense in the tort case. Under our well-established case law, IIC's interference with and overt control over the attorneys voids all notion of independence on the part of defense counsel.[114] If a principal lacking the right of control nevertheless "personally interferes with, undertakes to do, manage or control the work of the independent contractor, he thereby destroys the relationship of

---

[112] R.1693-1731, Demetre Trial Brief, at p. 7. Attorney Schenkel "defended" Demetre for 562 days. *Id.*

[113] *Phelps v. State Farm Mut. Auto. Ins. Co.*, 736 F.3d 697, 705-76 (6th Cir. (Ky.) 2012)(applying Kentucky law, "a jury could reasonably find that State Farm exhibited bad faith in the extensive delay of nearly three years before Phelps's claim was settled."); *Cobb King v. Liberty Mut. Ins. Co.*, 54 Fed.Appx. 833, 837-38 (6th Cir.2003) (applying Kentucky law, a jury could find that delay of 18 months constituted bad faith); *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287, 293 (Ky. App. 2007)(bad faith verdict affirmed where plaintiff for years "fought his insurer to obtain the coverage for which he had contracted and paid").

[114] *See New Independent Tobacco Warehouse, No. 3 v. Latham*, 282 S.W.2d 846, 848 (Ky. 1955) The "general rule is the services of a professional man, such as a lawyer ... are rendered under an independent contract[.]"

independent contractor." *Madisonville, H. & E.R. Co. v. Owen.*[115]

The lawful relationship between an insurer and the attorney an insurer hires to defend its insured is clear under Kentucky case law. In *American Ins. Ass'n. v. Kentucky Bar Assn.*,[116] the insurance industry sought permission for its insurer members to use in-house lawyers to defend their insureds, or to engage outside counsel on a "set fee" or retainer basis to handle all litigation. This Court flatly denied both requests. Reaffirming the sanctity of the relationship between the insured and the attorney hired to defend him, the Court re-emphasized that "[n]o man can serve two masters[.]"[117] Consequently, "it would be contrary to public policy to allow the insurer to control the litigation."[118] Here, IIC's adjusters *boasted* that they controlled the attorneys on both sides of the litigation.[119] The proof in this case—amply supported by expert testimony – demonstrated Appellant's adjusters willfully delayed and denied Mr. Demetre his rights under his insurance policy for more than three years. During that time period, the insurer waged an unjust, meritless, and extremely expensive legal war against its own insured -- attempting to defeat coverage by trying to financially break or spend Mr. Demetre into submission.[120] The verdict was just and the trial court correctly overruled IIC's JNOV motion.

iv. <u>IIC's breach of duty of indemnification.</u>

IIC also tried to avoid its duty of indemnification by asserting meritless "known loss" or "on-going loss" arguments. After dropping those "defenses" --because no

---

[115] *143 S.W. 421, 424 (Ky. 1912).*
[116] 917 S.W.2d 568 (1996).
[117] *American Ins. Ass'n* at 571. This Court also recognized certain "inherent pitfalls and conflicts" that may interfere with an attorney's duty and loyalty to a client. *Id.* at 571. Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is *controlling* the legal representation. *Id.* at 573. That is exactly what happened here when IIC controlled Demetre's legal defense.
[118] *Wheeler v. Creekmore*, 469 S.W.2d 559, 563 (Ky. 1971).
[119] VR: 9/24/12; 10:07:22; 9/24/12 10:41:08; 9/24/12; 11:42:09; 9/25/12; 1:50:31; and 9/25/12; 2:14:29.
[120] VR: 1/17/13; 09:17:21; VR: 1/17/13; 9:19:52 and Trial VR: 9/26/12; 03:41:42.

evidence supported them -- IIC then asserted and vigorously litigated an equally meritless "time-on-loss" theory in two separate cross claims against Mr. Demetre. Adjuster Magi admitted the time-on-loss defense was based on nothing but "possibility, speculation, and conjecture," **for which there was *no evidence*.**[121] Clear and satisfactory evidence proved that IIC repeatedly tried to deny -- and was successful in delaying – Mr. Demetre's rights to a legal defense and indemnification for more than three years without any basis.

v. Violations of Unfair Claims Settlement Practices Act.

USPA, KRS 304.12-230, requires an insurer to observe the duties of good faith and fair dealing when handling claims of an insured. In *Knotts v. Zurich Ins. Co.*,[122] the Supreme Court held that KRS 304.12-230 applies both before and during litigation.[123] Kentucky's "bad faith action is based upon the fiduciary duty owed by an insurance company to its insured based upon the insurance contract."[124] The jury found that IIC violated each and every provision of KRS 304.12-230(1)-(6).[125] IIC's reckless and malicious disregard for the rights or interests of its policyholder is bad faith under Kentucky law.[126] The trial court correctly overruled IIC's motion for a directed verdict on Mr. Demetre's UCSPA claims.

Contrary to IIC's arguments, this case fits squarely within the criteria of bad faith set forth in *Wittmer v. Jones*:[127] (1) IIC was obligated to investigate, defend, and either

---

[121] Trial VR: 9/24/12; 03:45:24.
[122] 197 S.W.3d 512, 517 (Ky. 2006).
[123] The public purpose of the USCPA is explained in *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988) ("This statute is intended to protect the public from unfair trade practices and fraud. It should be liberally construed so as to effectuate its purpose.").
[124] *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 380 (Ky. 2000).
[125] R. 2104-2131 at pp 9-12.
[126] *See Wittmer*, at 889; *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340, 343 (Ky. 1986).
[127] 864 S.W.2d 885 (Ky. 1993).

defeat or pay the claims[128] under the terms of the policy; (2) IIC lacked a reasonable basis in fact or law for denying the claim; (3) IIC knew that there was no basis for denying the claim *and* still acted with reckless disregard towards the interests of Mr. Demetre. Clear and convincing evidence at trial proved that IIC went to great lengths to deny Mr. Demetre the benefit of his bargain – including controlling and manipulating Demetre's defense counsel, generating fraudulent defenses, and withholding evidence favorable to the insured in a corporate-wide scheme designed to circumvent the duties owed him under the insurance policy.

vi. This case is about IIC's bad-faith claims handling practices, not lawyer misconduct.

IIC argues that it should not be held liable for the litigation conduct of its defense counsel. It wasn't. The misconduct that led to the verdict against IIC was that of the company's adjusters, claims handlers, and executives. Mr. Frederick admitted as much:

> Q Mr. Frederick, you do understand that in this case we're making allegations of bad faith by the Indiana Insurance Company's claims handling these practices involving James Demetre's policy, correct?
> A Correct.
> Q It's not allegations of misconduct by the attorneys, correct?
> A Correct.[129]

The only *mention* of the conduct of defense counsel was in the proof that defense counsel were controlled and manipulated by Mr. Magi, Mr. Wise, and other corporate representatives of IIC. To the extent that there was implicit criticism of defense counsel,

---

[128] "At its most basic, the word 'claim' means an assertion of a right, with the contours and specific nature of the right depending on context." *Knotts* at 516. Demetre's claim was to his rights under his insurance policy -- a fair investigation of the *Harris* family claims, an independent legal defense, and indemnity in the event liability was proven, up to the limits of his policies.
[129] VR 9/25/12; 03:41:38.

it was in the context of their every action being controlled by IIC claims handlers.[130]

Hamilton Mut. Ins. Co. of Cincinnati v. Buttery[131] also addresses this argument. In *Buttery*, this Court held that "evidence of an insurer's settlement behavior throughout the litigation may be examined and presented in order to establish an insurer's bad faith."[132] In *Buttery*, not only did the court consider the insurer's claim-adjusting practices throughout the case -- both before and after suit was filed -- but so did the jury. The jury awarded the insured compensatory damages (including emotional distress damages) and punitive damages, all of which were upheld on appeal.

It was IIC's claims handlers, not counsel, who wrongfully tried to deny Mr. Demetre the benefits of his policy. At the hearing on the motion for a new trial or JNOV, the judge summarized the proof of the adjuster's control over the attorneys:

> This is about the insurance company conduct, not about its lawyers. . . It's about adjuster and internal, you know, how an insurance company handles its claim, not how its lawyers handles its claims, because the adjusters make most of the calls on what, you know, what they can spend and who they can hire…It's about their conduct, not the lawyers.[133]

vii. The filing of a declaratory judgment action -- based on admittedly nothing more than possibility, conjecture, and speculation -- does not insulate IIC from liability.

Mr. Demetre has never alleged that IIC committed bad faith by simply challenging coverage.[134] But no case law permits an insurer to challenge coverage based solely on false statements, conjecture, possibility, or speculation. Nothing supports the proposition that an insurer can offer false testimony about documents that do not exist to support sham coverage defenses or hide exculpatory evidence as IIC did here.

---

[130] VR: 9/24/12; 10:07:22. See also FN 119, *id.*
[131] 220 S.W.3d 287 (Ky. App. 2007).
[132] *Id.* at 294.
[133] VR: 1/17/13; 09:41:08.
[134] VR: 1/17/13; 09:15:24.

IIC dropped its defense theories of known loss and ongoing loss on February 10, 2011.[135] Nonetheless, IIC now claims that these "defenses" are ones of "first impression." IIC's argument is a red herring. First, IIC waived this argument when it dismissed both defenses in February 2011. Second, adjuster Magi fabricated these defenses when he testified as IIC's representative that no documents in its claim file could prove these defenses.[136] Third, adjuster Magi admitted at trial that both defenses had no factual basis.[137] Fourth, IIC failed to list this issue for appeal in its Prehearing Statement, as required by CR 76.03(8). IIC waived this deceptive argument and should not be allowed to resurrect it before this Court as an excuse for its bad-faith misconduct in this case. Accordingly, it is in appropriate for IIC to advance this specious argument in this Court.

viii. There was never any agreement among the attorneys and trial court to slow down discovery in the *Harris* case.

IIC's next argument is that the trial court and parties made an agreement "...that the tort claim should be slowed down until the coverage issues were resolved. Then Mr. Demetre was allowed to present an opinion and argue that the delay was the result of Indiana Insurance's bad faith."[138] IIC cites to the avowal testimony of attorney Timothy Schenkel in which he discussed his version of what was said at a July 22, 2010 discovery conference to make this claim in this Court.

Mr. Schenkel's avowal and IIC's argument are clearly disproven by orders entered by the trial court on August 10, 2010, and May 13, 2011. The August 10, 2010, order, discussing the discovery conference on July 22, 2010, reads in its relevant part,

"**IT IS FURTHER ORDERED** that discovery shall proceed on all issues

---

[135] R. 321 – 331; R. 2762 - 2767 at p. 2.
[136] R: F at pp. 44-46.
[137] VR: 9/24/12; 03:45:24; R: F at pp 44-46, *id.*
[138] Appellant's Brief, at 21. Mr. Schenkel's avowal testimony is at VR: 9/26/2012; 12:31:02.

> as it is the Court's intention to try these issues within a short time of each other."[139]

Likewise, the order dated May 13, 2011, shows that Judge Stine never strayed or swayed from his determination that the whole case was to proceed simultaneously and without delay. That order reads, in its relevant part,

> The Court lauds appropriate zealous advocacy, but in this case, the Harris family claims have languished while the defendants have repeatedly crossed swords. The Court orders the parties to make the litigation of the underlying tort their top priority henceforth so the plaintiffs can have their day in court..."[140]

IIC's assertion to this Court, as well as to the Court of Appeals, that the trial judge "slowed the tort claim" is disingenuous at its best and blatantly false at its worst.

ix. The unpublished *Settles* decision is not persuasive legal authority.

IIC argues that *Settles v. Owners Ins. Co.*,[141] an *unpublished* Court of Appeals opinion, somehow demands reversal in this case.[142] After granting IIC's motion for discretionary review, this Court *denied* IIC's motion to supplement its motion with a citation to *Settles*. *Settles* is clearly distinguishable from what occurred here and the unpublished decision is not binding on this Court. Because there is published case law on point, *Settles* is not appropriately cited under CR 76.28(4)(c). Settles is inapposite.

IIC's willful and fraudulent misconduct in this case is a far cry from what occurred in *Settles*. Unlike the facts in this case, the *Settles* case had no proof of: (a) intentional delay in the investigation by the insurer; (b) intentional delay and denial of indemnity; (c) direction, control, and manipulation of both defense counsel and coverage

---

[139] R: 130-131.
[140] R: 354-356, at p. 3 of the order.
[141] 2015 Ky. App. Unpub. LEXIS 623; 2015 WL 5095315.
[142] Judge Kelly Thompson, Jr., the Court of Appeals Judge who wrote the *Demetre* opinion, sat on the *Settles* panel.

counsel by adjusters and attorneys of the insurer; and (d) severe prejudice created by the insurer regarding the insured's right to an independent legal defense.

Unlike *Demetre*, the *Settles* opinion concludes that counsel was, in fact, not controlled by the carrier and counsel took actions independent of the carrier. The appellant in *Settles* also made no effort to develop any facts to support the UCSPA claim. In *Settles*, the Court of Appeals held that the insured's bad faith claim was barred "to the extent it was based upon Owners Insurance's *mere filing of [its declaratory judgment] action*."[143] The *Settles* case is not binding precedent and is totally inconsistent with the evidence in this case. IIC's argument based on *Settles* should be disregarded.

x. Legal fees incurred to fight fraudulent business practices are ascertainable losses under the CPA.

Demetre's homeowners policy is covered by the CPA. His insured property was for personal use.[144] KRS 367.220(1) states that "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of...[an] act or practice declared unlawful by 367.170, may bring an action."[145]

The trial court ruled that Mr. Demetre's attorney fees and other litigation expenses were "ascertainable losses" under the CPA due to the intentional, deceitful misconduct of IIC's adjusters. IIC's fraudulent misconduct, carried on for more than three years, was devastating on Mr. Demetre's financial well-being. The trial court ruled:

> Mr. Demetre was forced, and the jury found, under the theory of Plaintiff's case, to spend large sums defending himself against coverage defenses which never should have been brought against him, as the jury

[143] *Settles*, No. 2014-CA-1162-MR at p. 8 (emphasis added).
[144] VR: 1/17/13; 09:25:48.
[145] The CPA has been given wide application to provide Kentucky consumers with the broadest possible protection against illegal acts. *Stevens v. Motorists Mutual Insurance Co.*, 759 S.W.2d 819, 820 (Ky. 1998)

> found . . . I found, and I still find, that attorney's fees that an individual shouldn't have to expend can be, uh, ascertainable loss of money or property . . . That's what we have here.[146]

The Court of Appeals agreed. The cases IIC cites for the premise that attorney fees are not an ascertainable loss are distinguishable.[147] In *Holmes* and *Yates*, the plaintiffs claimed, as their ascertainable loss, fees incurred to sue the defendants under the CPA. Here, Mr. Demetre was the defendant. He incurred attorney fees and expenses to *defend* himself against IIC's knowing, deceitful, false, and meritless defenses that IIC vigorously litigated against him for more than three years.[148]

The supreme courts of many other states hold that attorney's fees an insured is forced to incur due to unfair, fraudulent, or tortious conduct by his or her insurer are a verifiable economic loss, the same as an "ascertainable loss" under Kentucky law.[149]

IIC also argues that Demetre's attorney fees cannot be considered an "ascertainable loss" because the attorney fees were not part of the jury's award. However, attorney fees are not within the province of the jury; it is a remedy to be applied by the trial court.[150] To support a verdict under the CPA, the jury must find that the plaintiff suffered an ascertainable loss as a result of the defendant's unfair, false, misleading, or

---

[146] VR: 1/17/13; 09:20:31.

[147] *Holmes v. Countrywide Financial Corp.*, Slip Copy, 2012 WL 2873892 (W.D. Ky. 2012) and *Yates v. Bankers Life & Cas. Ins. Co.*, 720 F. Supp.2d 809, 816 (W.D. Ky. 2010).

[148] "[T]he plain meaning of the KCPA damages provision requires only a showing of a causal nexus between the plaintiff's loss and the defendant's allegedly deceitful practice."*Corder* v. *Ford Motor Co.*, 869 F. Supp. 2d 835, 838 (W.D. Ky. 2012).

[149] *Mustachio v. Ohio Farmers Ins. Co., supra*, 44 Cal.App.3d 358, 363 (1975); see also *Farm Bureau Mut. Ins. Co. v. Kurtenbach*, 961 P.2d 53 (Kan. 1998) *DeChant v. Monarch Life Ins. Co.*, 547 N.W.2d 592, 597 (Wis. 1996); *Hegler v. Gulf Ins. Co.*, 243 S.E.2d 443 (S.C. 1978); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73 (W.Va. 1986); *McGreevy v. Oregon Mut. Ins. Co.*, 904 P.2d 731 (Wash. 1995); *American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 276 (Mo.App. 1995); *Mountain West Farm Bureau Mutual Ins. Co. v. Brewer*, 315 Mont. 231, 244 (2003); *State Farm Fire and Cas. Co. v. Sigman*, 508 N.W.2d 323, 325 (N.D. 1993); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 822 N.E.2d 777 (N.Y. 2004).

[150] KRS §367.220(3).

deceptive conduct.[151] There is no requirement in the statute that the jury must *fix* the amount of the loss for the CPA to apply. Here, the jury heard testimony that Mr. Demetre incurred substantial attorney fees to defend himself against IIC's fraudulent declaratory judgment actions. The jury's finding that Demetre suffered that loss as a result of IIC's wrongful, willful, and wanton conduct is enough to support its verdict on the CPA.

xi. There was no error in the jury instructions.[152]

IIC claims that the jury instructions in this case allowed Mr. Demetre to recover emotional distress or punitive damages for breach of contract.[153] That is incorrect. Each party submitted proposed instructions and then worked jointly with the trial court's law clerk to finalize jury instructions. On the issue of punitive damages, the trial court stated:

> Ms. Lomond was on the phone, as was Mr. Bob Sanders . . . if all they [the members of the jury] return is breach of contract, then everybody agreed they were not recoverable, which is why we -- you can't give punitive damages for breach of contract in Kentucky, which is why we couched that one instruction . . . If you only found for number 6, but essentially not under 2 and 4, then, you know, you can't go to punitive damages.[154]

No party objected to the recovery of punitive damages for violation of the CPA.

The Jury Instructions authorized emotional distress and punitive damages *only* under the UCSPA and CPA.[155] Mental-distress damages are recoverable under *both* acts[156] and punitive damages are recoverable for violation of UCSPA.[157] At the JNOV

---

[151] KRS §367.220(1).
[152] This issue is not properly before the Court because instructional error was not identified as an issue in IIC's motion for discretionary review. See *Ellison v. R&B Construction, Inc.*, 32 S.W.3d 66, 72 fn. 9 (Ky. 2000)("The Ellisons' Motion for Discretionary Review focused solely on the directed verdict issue and made no mention of the punitive damage and injunctive relief issues they raised before the Court of Appeals. Although those issues were briefed before us and addressed at oral argument, we find that neither the punitive damages nor the injunctive relief issue is properly before this Court. CR 76.20(3)(d).")
[153] Appellant's Brief, pp. 14, 21.
[154] VR: 10/1/12; 12:14:19.
[155] R. 2104-2131, Instruction 12.
[156] Courts in other states have held that emotional distress damages are available in consumer protection cases where the defendant has acted fraudulently or with some other culpable mental state. See, *e.g.*, *Dodds v. Frontier Chevrolet Sales & Service, Inc.*, 676 P.2d 1237, 1238 (Colo. App. 1983); *Captain & Co.*,

hearing, the trial court ruled that "any objection to getting emotional distress damages under the CPA has been waived by IIC's failure to object."[158] Even if the objection had not been waived, the error, if any, was harmless because the jury found for Mr. Demetre under both Verdict 2 -- the UCSPA verdict -- and Verdict 4 -- the CPA verdict.

xii. The trial court did not abuse its discretion by excluding belated and misleading testimony from attorneys Schenkel and Lane.[159]

The trial court did not err by excluding the potential testimony of attorneys Schenkel and Lane. IIC failed to timely disclose them as trial witnesses and failed to provide discovery as to any testimony they might give at trial.[160] Violations of a trial court's discovery orders can result in the exclusion of otherwise admissible evidence.[161] Other grounds existed as well.[162] To the extent that Mr. Schenkel's avowal claimed, "... the trial judge agreed that the tort claim should be slowed down until the coverage issues were resolved...,"[163] the trial judge *knew* the avowal testimony was false and was contrary to *two* orders specifically addressing the timing of discovery.[164] A trial judge is vested with the discretion and authority to exclude testimony that he *knows* to be false and directly contradicted by orders of record. Exclusion of this testimony was well within

---

Inc. v. Stenberg, 505 N.E.2d 88, 100 (Ind. App. 1987); *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002); *Vercher v. Ford Motor Co.*, 527 So.2d 995, 1000 (La.App. 3rd Cir. 1988)(citing *Bank of New Orleans & Trust Co. v. Phillips*, 415 So.2d 973 (La.App. 4th Cir. 1982); *Barnette v. Brook Road, Inc.*, 429 F. Supp.2d 741 (E.D. Va. 2006); *Haddad v. Gonzalez*, 576 N.E.2d 658 (Mass. 1991).

[157] *Motorists Mutual Ins. Co. v. Glass*, 996 S.W.2d 437, 454 (Ky. 1999); *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993).

[158] VR: 1/17/13; 09:30.00.

[159] This is issue also is not properly before the Court for the same reason as the instructional error argument -- it was not raised in the motion for discretionary review. See *Ellison v. R&B Construction, Inc.*, 32 S.W.3d 66, 72 fn. 9 (Ky. 2000).

[160] VR: 1/17/13; 09:40:15.

[161] *Rossi v. CSX Transportation, Inc.*, 357 S.W.3d 510, 517 (Ky.App. 2010); *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 279-80 (Ky.App. 2006).

[162] Attorney Schenkel, as Demetre's former attorney, remains bound by the attorney-client privilege. Mr. Demetre *never* waived this privilege, which belongs to him, not to the attorney or insurance company. VR: 1/17/13; 9:40:20.

[163] VR: 9/26/12; 12:31:02.

[164] R: 130-131; R: 354-356.

the trial court's sound discretion and inherent authority over his courtroom.

II. Damages awarded to Mr. Demetre were proper.

In denying IIC's motion for JNOV, the trial judge astutely summarized the evidence that the jury considered in awarding emotional distress damages.[165] The trial court ruled that the evidence was more than sufficient to support the verdict, especially when considered in the context of IIC's fraudulent acts and its malicious and intentional mistreatment of Mr. Demetre for more than three years:

> [T]he proof here, we had testimony from Mr. Demetre as to the effect it had on him. And there was this, he did testify, that you know, he's 72 years old, and here, you know, he's kind of built this good life for himself after some missteps early in his life and he's done the right thing and he's built this good life, a pretty good life, and then all the sudden, you know, at 72 he's looking to lose it all. ... [T]hat was the context that he testified within and we had this overriding context of the insurance company conduct. And, which gave the context to his testimony, those circumstances which caused the alleged emotional distress were pretty clearly laid forth, I thought it was pretty clear. Those circumstances were pretty clearly articulated by Plaintiff what Indiana's alleged conduct was in this case and the jury made a decision. I think there was plenty of proof particularly where the circumstances which surrounded his testimony, you know, his alleged distress arose from those. I say, "alleged;" I mean, a jury found.[166]

The jury verdict awarding Demetre compensatory damages is not "palpably or flagrantly against the evidence," under the standard set forth in *Childers Oil*. The award of emotional distress damages should be upheld.

On review of a motion for directed verdict, an appellate court must accept all evidence that favors the prevailing party as true. As stated by this Court in *Childers Oil*

---

[165] As stated by this Court in *Childers Oil Co., Inc. v. Adkins*, a reviewing court is "not at liberty to assess the credibility of witnesses or determine what weight is to be given the evidence." *Id.* at p. 25. To reverse, a verdict must be so palpably or flagrantly against the evidence as to invalidate the verdict. *Id.*

[166] VR: 1/17/13; 9:35:11.

Co., Inc. v. Adkins,[167] a reviewing court is "not at liberty to assess the credibility of witnesses or determine what weight is to be given the evidence."[168] To reverse, a verdict must be so palpably or flagrantly against the evidence as to invalidate the verdict.[169]

In *Childers Oil*, plaintiff asserted statutory violations under the Kentucky Civil Rights Act ("KCRA") and sought actual damages for emotional distress. The jury awarded damages based solely on plaintiff's testimony. On appeal, Childers Oil made the same argument as IIC, except Childers Oil claimed the heightened "severe" emotional distress standard for intentional infliction of emotional distress ("IIED") applied.[170]

This Court rejected the argument: "Adkins did not bring an action for IIED; rather she requested an instruction for compensatory damages under the Kentucky Civil Rights Act, which would include emotional distress."[171] This Court also rejected Childers Oil argument that plaintiff's own testimony of distress was insufficient. This Court held: "The assessment of damages is a matter left in the hands of the jury, and their decision should be disturbed only in the most egregious circumstances."[172]

i. Standard for proving emotional distress damages in a UCSPA case.

The standard for damages in a statutory bad-faith case is found in *Motorists Mutual Ins. Co. v. Glass.*[173] To prove damages for anxiety and mental anguish requires either "***direct or circumstantial evidence from which the jury could infer that anxiety or***

---

[167] *Childers, id.*, at p. 25.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 27-28. Childers Oil made the alternate argument that emotional-distress damages were "excessive." ***IIC does not challenge the compensatory damage award as "excessive" on appeal.*** Therefore, it makes no difference how much money the jury awarded Demetre for compensatory damages.
[171] *Id.* at 28.
[172] *Id.*
[173] 996 S.W.2d 437 (Ky. 1999)(emphasis added).

mental anguish in fact occurred."[174] The Court in *Motorists Mutual* cites cases involving damages for violations of the KCRA— the same statute at issue in *Childers Oil*.[175] Consistent with *Childers Oil* and *Motorists Mutual*, other state Supreme Courts, including those recently considering the issue, have held that a party seeking bad-faith emotional distress damages "***does not have to demonstrate the heightened standard of proof required for an independent, stand-alone claim of negligent or intentional infliction of emotional distress.***"[176]

Here, the jury was entitled to find -- and did find -- that Mr. Demetre experienced emotional pain and suffering, stress, worry, anxiety, and mental anguish due to IIC's willful scheme to deny him the benefits under his policy. His emotional distress was caused by IIC's willful misconduct in hiding evidence, denying him a prompt and reasonable investigation into the Harris family claims, by manipulating and controlling his defense counsel, and by repeatedly suing Mr. Demetre based on nothing but sheer "possibility, speculation and conjecture."[177] IIC's intentional and deceitful wrongdoing drained Mr. Demetre's life savings and put his retirement in jeopardy.[178] The jury verdict awarding Mr. Demetre compensatory damages for emotional distress is not "palpably or flagrantly against the evidence," under the standard set forth in *Childers Oil*.

ii. ***Osborne's* requirement for expert testimony to prove an emotional distress injury does not apply in a non-NIED case.**

IIC maintains that because Mr. Demetre did not present expert medical or

---

[174] *Supra*, at 454.
[175] *Motorists Mutual Ins. Co.*, 996 S.W.2d at 454, citing *Mountain Clay, Inc. v. Commonwealth, Commission on Human Rights*, 830 S.W.2d 395, 397 (Ky. App. 1992); *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).
[176] *McVey v. USAA Cas. Ins. Co.*, 313 P.3d 191, 195 (Mont. 2013)(emphasis added); see also 22 Am. Jur. 2d Damages § 232 (2014); *Goodson v. American Standard Ins. Co. of Wisconsin*, 89 P.3d 409 (Colo. 2004); *Farmers Group, Inc. v. Trimble*, 768 P.2d 1243 (Colo. App. 1988).
[177] VR: 9/24/12; 3:45:24.
[178] VR: 1/17/13; 09:35:24; VR: 9/26/12; 3.39.23.

scientific testimony to establish that his emotional distress was severe or serious, the damages awarded by the jury in this case must be vacated. IIC's argument is erroneous as a matter of law. The heightened standard of proof for establishing an emotional-distress injury in *Osborne v. Kenney*[179] was specifically intended to apply to negligent infliction of emotional distress ("NIED") cases, and *not* in cases in which a person is injured as a direct result of intentional, willful, wanton, malicious, and deceitful misconduct by an insurance company in a bad-faith case.[180]

In *Osborne*,[181] this Court recognized the independent tort of negligent infliction of emotional distress ("NIED") in the absence of "physical contact or injury," but raised the standard of proof for emotional injury to prevent frivolous or contrived NIED claims. The case *sub judice* is a statutory and common-law bad-faith case, not a NIED case.

In *Osborne*, this Court adopted the analysis of NIED that the Tennessee Supreme Court had established in *Camper v. Minor*.[182] Just as the *Camper* decision had done in Tennessee, *Osborne* eliminated the "physical impact" requirement in NIED cases in Kentucky, but required the plaintiff in a NIED case to prove a "severe" or "serious" emotional injury and present expert testimony to support the emotional injury claim.[183] In *Estate of Amos v. Vanderbilt University*,[184] the Tennessee Court clarified that this

---

[179] 399 S.W.3d 1 (Ky. 2012).
[180] This Court also rejected Childers Oil's argument that plaintiff's own testimony of distress was insufficient. It held: "[t]he assessment of damages is a matter left in the hands of the jury, and their decision should be disturbed only in the most egregious circumstances." Application of the heightened proof requirements for NIED cases from *Osborne* to all cases involving a claim for emotional distress damages would overturn this Court's holding in *Childers Oil*, a case decided just four years before *Osborne*. Certainly, that was not this Court's intent.
[181] *Osborne*, *id.*
[182] 915 S.W.2d 437 (Tenn. 1996); In *Osborn*, 399 S.W.3d at 17, the Court stated "to ensure claims are genuine, we agree with our sister jurisdiction, Tennessee, that recovery should be provided only for "severe" or "serious" emotional injury."
[183] *Id.* at 16-17.
[184] 62 S.W.3d 133 (Tenn. 2001).

heightened proof standard is not required to prove claims of emotional distress in non-NIED causes of action where there is less risk of fraudulent or contrived claims:

> Vanderbilt contends that *Camper's* requirements of expert medical or scientific proof and serious or severe injury extend to all negligence claims resulting in emotional injury. We disagree. The special proof requirements in *Camper* are a unique safeguard to ensure the reliability of "stand-alone" negligent infliction of emotional distress claims. The subjective nature of "stand-alone" emotional injuries creates a risk for fraudulent claims. The risk of a fraudulent claim is less, however, in a case in which a claim for emotional injury damages is one of multiple claims for damages. When emotional damages are a "parasitic" consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to "stand-alone" emotional distress claims.[185]

iii. The *Banker* case did not apply the *Osborne* proof requirement

In August 2015, this Court unanimously ruled on the proof requirements for emotional distress injuries in a non-NIED case in *Banker v. Univ. of Louisville Ath. Ass'n, Inc.*[186] In *Banker*, the plaintiff sued the University of Louisville Athletic Association, alleging sexual harassment and gender discrimination. A Jefferson County jury found for Ms. Banker on her retaliatory discharge claim and awarded her damages of $300,000 for emotional distress and $71,875 for lost wages. On appeal, the Kentucky Supreme Court upheld the verdict and judgment in its entirety. Directly relevant to IIC's primary argument in this appeal, Ms. Banker neither sought help for her symptoms nor presented any expert testimony regarding her emotional distress injuries. Only Ms. Banker and her mother presented lay testimony about her emotional-distress injuries.[187]

---

[185] *Estate of Amos*, 62 S.W.3d at 136-37 (internal quotations, parentheses, and citations omitted).
[186] 466 S.W.3d 456 (Ky. 2015).
[187] In support of her claim of emotional distress damages, Ms. Banker testified that she suffered significant stress with accompanying loss of appetite, weight loss, depression, and sleep disturbance. Ms. Banker testified that she had *not* sought any treatment for her symptoms because she lost her health insurance and could not afford her COBRA payments. In addition to her own testimony, Ms. Banker offered testimony from her mother that her daughter seemed stressed and lost weight during her time at the University and that her daughter was devastated when she lost her job. *Id.*, at p. 463.

By ruling in Ms. Banker's favor in a non-NIED case involving emotional-distress injuries, this decision implicitly limits the *Osborne* requirement of scientific or medical expert testimony to only NIED cases. The *Osborne*[188] case was neither mentioned in the *Banker* decision nor otherwise cited as controlling legal precedent in the well-reasoned discussion of Ms. Banker's emotional distress injuries and damages. Notably, the *Banker* decision is neither mentioned nor discussed in IIC's Appellant brief.

In this case, the jury found that Mr. Demetre experienced emotional pain and suffering, stress, worry, anxiety, and mental anguish due to IIC's willful scheme to deny him the benefits under his policy.[189] IIC's intentional and deceitful wrongdoing drained Mr. Demetre of his life's savings and put his retirement in jeopardy.[190] Mr. Demetre testified that having to defend himself against IIC's baseless accusations and bogus claims and defenses was a "nightmare" and a "disaster."[191] He described the anxiety and stress he endured when he worried about what would happen to him and his wife, Kathy, if the insurance company denied coverage and the *Harris* family claims proved to be meritorious.[192] Mr. Demetre was terrified about the potential of going bankrupt.[193] He recalled not being able to share his feelings and concerns with his wife for fear that the additional stress would exacerbate her pre-existing heart condition.[194] In addition to being worried about the outcome, Mr. Demetre also explained his shock that IIC had refused to honor its promises as set forth in the insurance contract.[195]

iv. Federal district court decisions are not persuasive on this issue.

[188] *Osborne, id.*
[189] VR: 1/17/13; 9:35:11.
[190] VR: 9/26/12; 3:39:23.
[191] VR: 9/26/2012; 3:38:48; VR 9/26/12; 4:20:56.
[192] VR 9/26/2012; 3:39:23.
[193] VR 9/26/2012; 3:41:44.
[194] VR: 9/26/12; 4:13:07.
[195] VR: 9/26/2012; 4:21:31.

IIC's reliance on federal district court opinions applying *Osborne* to non-NIED cases involving emotional distress injuries is wholly unpersuasive. There are many reasons why this Court should decline to follow the federal district court cases cited by IIC. First, none of those cases cited are bad-faith insurance actions. Second, plaintiffs in the district court cases cited by IIC conceded that *Osborne* applied to their case. Third, IIC *admits* that the only district court to address the *Osborne* case in an insurance bad-faith case, *Minter v. Liberty Mutual Fire Ins. Co.*,[196] held that *Osborne* proof standard does *not* apply.[197] The opinion reads in its relevant part:

> Here, bad-faith conduct in settling a claim is alleged to have caused the Plaintiff emotional harm. This is not a claim sounding in negligence, NIED, or IIED. Liberty Mutual cites no authority applying *Osborne* in the context of bad faith. Nor could it, because plaintiffs claiming statutory violations have recovered for humiliation, embarrassment, or nervous shock, and the courts allowing those recoveries did not require evidence of serious and severe emotional injury.[198]

Third, in *MacGlashan v. ABS Lines KY, Inc.*,[199] the federal district court followed the reasoning in *Minter* and limited *Obsorne's* requirement for expert testimony on emotional distress injuries to NIED and IIED claims.[200] While this Court is certainly not bound by federal district court opinions predicting or applying our state law,[201] the memorandum opinions in *Minter* and *MacGlashan* are consistent with longstanding Kentucky jurisprudence on emotional distress damages, including this Court's most recent analysis in *Banker*.[202]

---

[196] 2014 WL 4914739 (W.D. Ky. 2014).
[197] *See* Appellant's Brief at p. 35, citing *Minter v. Liberty Mutual Fire Ins. Co.*, 2014 U.S. Dist. LEXIS 137741.
[198] *Minter*, 2014 WL 4914739 at 5.
[199] 84 F. Supp. 3d 595 (W.D. Ky. 2015).
[200] *See MacGlashan*, 84 F. Supp. 3d at 605.
[201] *Aull v. Houston*, 345 S.W.3d 232, 236 (Ky. App. 2010)("We are not bound, however, by the federal court's prediction.")
[202] *Id.*

As pointed out by *Amicus Curiae*, Kentucky Justice Association, "Forty four (44) sister states agree with the Kentucky Court of Appeals and the Campbell Circuit Court (and the United States District Court for the Western District of Kentucky) that insurance bad faith claims ... may be brought against an insurer without expert evidence to support emotional distress damages."[203]

v. The issue of the punitive damages award is not properly before this Court, so that portion of the verdict must be upheld.

The jury's award of punitive damages to Mr. Demetre should be upheld. In its motion for discretionary review, IIC did not argue either that Mr. Demetre was not entitled to punitive damages or that the punitive damages award was excessive. Likewise, that argument does not appear ***anywhere*** in IIC's brief. IIC has thus waived any argument it may have had on punitive damages and is foreclosed from arguing it in its Reply brief or at oral arguments. Similar to issues regarding jury instructions and the testimony of Schenkel and Lane, any challenge to the award of punitive damages is not properly before the Court because it was not raised in the motion for discretionary review.[204] Therefore, the part of the judgment awarding punitive damages must stand.

Moreover, any argument that the punitive damage award is excessive is not preserved. Failure to object to the amount of damages in the "not to exceed" line of jury instructions waives any post-judgment challenge to the excessiveness of damages. *Gersh v. Bowman*[205] (excessive verdict argument on appeal was improper "because [defendant] failed to specifically object to the 'not to exceed $2,000,000.00' provision and the jury

---

[203] Brief on Behalf of *Amicus Curiae*, Kentucky Justice Association, at 9-10 (listing cases from each of the 44 states). Mr. Demetre adopts the arguments of KJA, as those arguments are identical to the arguments Mr. Demetre made in the courts below.
[204] *See Ellison v. R&B Construction, Inc.*, 32 S.W.3d 66, 72 fn. 9 (Ky. 2000).
[205] 239 S.W.3d 567, 574 (Ky. App. 2007).

did, in fact, award $2,000,000.00.") IIC never objected to the $10,000,000 on the "not to exceed" line for punitive damages or the $2,500,000 on the not to exceed line for actual damages. Here, the jury awarded far less than the requested amounts, and less than the 4-to-1 ratio requested. IIC did not object to the amounts in the instructions so the excessiveness argument is not preserved in this appeal.[206]

III. The trial court's order regarding attorney's fees is proper.

IIC cites no valid reason why the trial court's order awarding attorney's fees under the CPA should be overturned. Furthermore, IIC did not name Demetre's personal counsel as a party to this appeal, as required by Kentucky law. Mr. Demetre's attorneys are "indispensable parties" to this appeal because they have an interest that may be affected by the outcome of the appeal.[207]

On February 8, 2013, the trial court ordered IIC to pay the fees of Demetre's counsel directly to counsel.[208] The fee award is enforceable by Mr. Demetre's attorneys. Such a fee award is *not* a contractual arrangement between a party and his counsel. The fees at issue were awarded by the trial court and ordered to be paid directly to the attorneys. It is a fatal jurisdictional error for IIC to fail to name Demetre's counsel as a party to this appeal under CR 73.02.

---

[206] To the extent IIC attempts to improperly revive any arguments regarding punitive damages in its reply or in arguments -- which would be entirely improper and against this Court's rules and case law -- Mr. Demetre relies upon the legal analysis on this issue set forth in his briefs in the Court of Appeals at pp. 23-24.

[207] Failure to name an indispensable party in the notice of appeal is a fatal jurisdictional defect that cannot be remedied. CR 73.02; *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 626 (Ky. 2011); and *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

[208] The Court's Fee Award Order requires that Appellant "***shall pay plaintiff's counsel fees***" as opposed to the Court-ordered costs and litigation expenses, which were separately identified by the trial court when it ordered Appellant to pay "*Demetre's taxable costs*" or "*Demetre's litigation expenses*." The trial court clearly allocated IIC's obligation to pay fees, costs, and expenses for its *willful* violations of the Consumer Protection Act and bad-faith litigation conduct. (Emphasis added). R. 2762 -- Order of February 8, 2013 at p. 5-6, *id.*).

CONCLUSION

For nearly three years, IIC waged an aggressive, expensive, vicious, and emotionally gut-wrenching war against Mr. Demetre, its own insured. The trial took eight days before a jury in one of Kentucky's most conservative counties. The evidence presented at trial was clear and convincing. The jury found in favor of Mr. Demetre on every issue. The verdict was reviewed by the trial judge and the Court of Appeals. Both concurred that the verdict was just and correct.

IIC is unrepentant and believes it has done nothing wrong. Rather than accepting any responsibility for its wrongful and intentional misconduct in this case, IIC -- and its supporting amicus -- urge this Court to adopt a black-letter rule that an insurer can challenge coverage for *any* reason, even if the insurer's legal theories are not supported by fact or law.

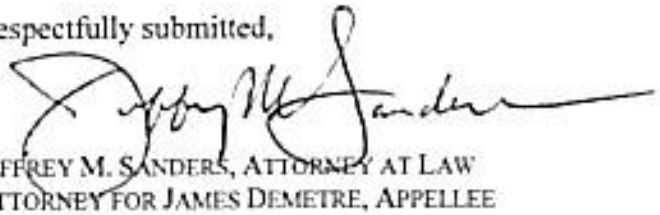
In this case, IIC brought a declaratory judgment action based upon defenses completely fabricated by adjusters, who knowingly lied about material facts and hid documentary evidence in an effort to deny Mr. Demetre the benefit of his bargain. Even after admitting coverage, IIC's intentional misconduct was exacerbated by the insurer continuing to sue Mr. Demetre based on nothing more than "possibility, speculation, and conjecture." What is more shocking is that IIC's upper management blessed, supported, and participated in the unlawful scheme from the beginning.

If this Court allows such deceptive business practices, an insurer's pitches to the public selling peace of mind and protection from unexpected or unintended liability are nothing more than sham illusions. Distilled down to its core, IIC wants this Court to say that an insurance company can undertake *any* nasty, underhanded, dishonest, or

fraudulent conduct -- and get by without first-party bad-faith liability -- so long as the insurance company can say, in the end, "we defended and indemnified" the insured. Adoption of IIC's arguments and its twisted reasoning would make for *very poor public policy* and would completely eliminate bad faith claims under any of the three theories recognized in Kentucky -- breach of the covenant of good faith and fair dealing, UCSPA, and CPA.

Mr. Demetre respectfully suggests that under the applicable standard of review – whether the jury verdict is palpably or flagrantly against the evidence -- this Court should affirm that verdict and the trial court's judgment. More importantly, this Court should affirm the judgment and render a decision that reinforces and supports the clear public policy established by the Kentucky Legislature in adopting CPA and UCSPA, and in prior decisions of this Court that have made it clear that insurance companies must deal with their policyholders in good faith rather than their own self interest.

Respectfully submitted,



JEFFREY M. SANDERS, ATTORNEY AT LAW
ATTORNEY FOR JAMES DEMETRE, APPELLEE